

Private Law in a Postnational Society

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The Law of the Future and the Future of Law

Sam Muller, Stavros Zouridis, Morly Frishman and Laura Kistemaker (editors)

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Private Law in a Postnational Society

Jan Smits^{*}

I intend to focus on two interrelated trends. The first is the replacement of law by other types of trust building relationships in the global economy. If we assume that national law is becoming less and less important and will not be replaced by a similar type of law at an international level, (private) parties have to look for other types of trust-building. The second trend is the increased role of (private) parties in choosing their own law. Many forms of 'legal tourism' have emerged over recent decades and it is likely that this trend will continue. The emergence of optional regimes is only one important example of this. At the same time, states will have to be much more precise about what they can still allow as a choice for a foreign or optional legal system. Both trends are likely to reshape the entire outlook of law.

1. Introduction

I have been asked what I regard to be the most significant challenge for the development of law in the coming three decades. This question presupposes that we have some idea of what developments are likely to occur: once we know what *will* happen, not only in the legal field, but in society in general, we will be able to say to what extent this development challenges our prevailing ideas about law. It is clear that some speculation is inherent in this type of exercise. My focus in this brief paper is on private law, although I should add that I believe it is impossible to separate this field from other areas of law. I will distinguish between substantive developments and changes in the ways in which we think about private law.

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2. Substantive Developments

At a substantive level, I identify three main developments, all related to the increasing de-nationalisation of law and society. For me, this de-nationalisation is a term that describes any process (such as Europeanisation and globalisation, but not limited to these) through which national law becomes less important. This de-nationalisation is in my view the most important development in the coming decades, and one that will substantially challenge our existing ideas about law. One need not be a visionary to see why this is the case. Law increasingly stems from entities other than the State, such as the European Union, supranational organisations or local legislative bodies. This development is well known and even though it raises important questions of legitimacy, the replacement of the authority of the state by other entities takes place in an explicit and transparent way. The main challenge lies somewhere else. The de-nationalisation of law also means that the authority of the national state *vis-à-vis* its own citizens becomes decreasingly important. We can identify two reasons for this.

First, de-nationalisation of law means that the law in a party's 'own' state is no longer necessarily applicable to the conduct of that party. Parties have a greater choice of which jurisdiction to use, which has led to many forms of 'legal tourism'. In various fields of law, parties can opt-out of using their national legal system and choose another jurisdiction. There is also an alternative trend which is likely to continue. Parties can increasingly choose a non-national regime, such as a European '28th' jurisdiction. This leads to a decoupling of law from the national state in the sense that citizens come to play a more prominent role in deciding which law will be applicable to the things they do. This has far-reaching consequences for how we perceive law: from law being imposed upon the citizens in a process of democratic representation, it becomes a product that citizens can choose, reminiscent of certain forms of direct democracy. Different communities will compete with each other in their efforts to apply a certain set of norms to an act or an actor.

Secondly, de-nationalisation means that the law itself is being replaced by other types of trust-building relationships. With the surpassing of national law, we should not try to replace it with a similar type of law at the international law (this is impossible at a global level), but give full recognition to alternative mechanisms. In commercial law,

this means that we have to develop new forms of creating legal certainty. In consumer law, it means that, *e.g.*, labelling schemes will partly take over the function that national law plays at the moment. This does not mean that there is no longer a place for national law, but it does mean that this place will necessarily be more limited. It also means that a fundamental discussion should take place about what states regard to be at the core of their society, leading to clear mandatory rules that citizens cannot deviate from, yet leaving scope for freedom in other fields.

3. Changes in Our Inherited Ways of Thinking

Apart from substantive developments, it may be useful to look at how legal thinking in the field of private law will be changing as a result of de-nationalisation. If we assume that private law has to meet certain requirements, one can try to identify how these requirements were met in the past (in particular in the last 200 years in which private law was highly national in nature) and how these requirements will be met in a different way in a postnational society. Here, I like to focus on three interrelated aspects: the accessibility and predictability of private law, the legitimacy of private law and private law as a way to bind people to a state.

The first function is the accessibility and predictability of private law. This function is closely related to the prevailing theory of sources: by keeping the amount of sources out of which private law originates fairly limited, private law remains manageable, thus offering the legal certainty that parties need. In civil law countries, this function has long been fulfilled by the adoption of a civil code by the national legislature and by a continuing systematisation of new case law by academics (and the use of this legal system by the courts). Codification was thus an important tool to create stability and rationality in law. In common law countries, the highest court carried out the same function by creating precedents that were binding on the lower courts and indeed, on the highest court itself.

Clearly the accessibility and predictability of law will not be ensured in the same way in the future. Already, private law is characterised by a plurality of sources and this will only increase in the future: different (or even similar) parts of private law are dealt with by different ‘lawgivers’, who will not have the responsibility for coherence and unity which inherently lies with an overarching institution. Multiple

‘systems’ of private law thus overlap with each other, as they deal with the same issues in different ways. This emerging pluralism leads to two challenges for traditional private law thinking. First, it would lead to a fundamental discussion about optimal levels of regulation: can we find the criteria to decide whether certain topics are better dealt with at the local, national, European or supranational level? Second, even if we are able to find such criteria, we still have to see how accessibility and predictability of private law are best guaranteed in a multilevel system of private law.

The second function is the legitimacy of private law. In civil law countries this function is traditionally also satisfied through a civil code and other pieces of legislation that pass through the democratic process at the national level. Again, the multiplication of sources has put an end to this. The many authoritative rules, norms and policies from sites of governance beyond the nation-state prompt us to find new ways to legitimise private law.

Finally, private law has long had the function of binding citizens to a particular country, especially in civil law jurisdictions, where the making of a civil code was an essential element of the nation-building exercise. But it is not only the idea that each country has its own unique law that ties law to a specific country. As we have seen before, citizens are in practice tied to the law of their country simply because of their place of residence. However, this is no longer true either: people today have many different affiliations and can often choose the jurisdiction they like best for different aspects of their life. In a postnational legal order, these voluntary associations with different legal orders will become increasingly important. This raises the question to what extent national states can accept this turn away from their own law.